IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1870

WHIRLPOOL CORPORATION,
Petitioner,

vs.

RAY MARSHALL, SECRETARY OF LABOR,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF PETITIONER.

ROBERT E. MANN,
RONALD J. HEIN, JR.,
MARK A. LIES, II,
Attorneys for Petitioner, Whirlpool Corporation.

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON,
55 East Monroe Street, Suite 4200,
Chicago, Illinois 60603,
(312) 346-8000,
Of Counsel.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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OPINIONS BELOW.

The Opinion of the Court of Appeals and the denial of rehearing and rehearing *en banc* are reported at 593 F. 2d 715 and are reproduced in the Appendix to the Petition for Certiorari[1] at pages A1-A42. The decision of the District Court is reported at 416 F. Supp. 30 and is reproduced in the Appendix to the Petition for Certiorari at pages A43-A49.

1. References to the Certiorari Appendix will be made with the designation ("C.A. ....."). References to the Joint Appendix will be made by the designation ("App. ....."). Reference to the testimony heard by the District Court will be made by the designation (Tr. .....). The parties jointly entered into evidence the transcript of testimony and exhibits entered in an administrative law hearing, *Secretary of Labor* v. *Whirlpool Corporation*, O. S. H. R. C. No. 9224; reference to that record will be made as (Jt. Ex. 1 .....).

JURISDICTION.

The opinion and judgment of the Court of Appeals were entered on February 22, 1979. A timely filed petition for rehearing and suggestion for rehearing *en banc* was denied on April 4, 1979. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1), the Petition for Writ of Certiorari having been filed on June 19, 1979, within ninety (90) days after the Court of Appeals' denial of rehearing.

RELEVANT STATUTE AND REGULATION PROVISIONS.

The relevant statutory provision is Section 11(c) of the Occupational Safety and Health Act of 1970 (84 Stat. 1590, 29 U. S. C. § 651 *et seq.*) which provides at 29 U. S. C. § 660 (c)(1):

> "(c)(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding *or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.*" (Emphasis added.)

On January 29, 1973, the Secretary of Labor published a regulation purporting to interpret that portion of the statute quoted above (in particular, the emphasized phrase "any right afforded by this Act"). 38 Federal Register 2681 (January 29, 1973), codified at 29 C. F. R. § 1977.12. In relevant part, the Regulation provides:

> § 1977.12 Exercise of any right afforded by the Act.
>
> (a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11(c) also protects employees from discrimination occurring because of the exercise "of any right afforded by this Act." Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (sec. 10). Certain other rights exist by necessary implication. For example, employees may request information from the Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations

could not subsequently be discriminated against because of their cooperation.

(b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perfom normal job activities because of alleged safety or health hazards.

(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain a correction of the dangerous condition.

QUESTIONS PRESENTED.

1. Whether the Secretary of Labor exceeded his authority in promulgating a regulation extending protections afforded by Section 11(c) of the Occupational Safety and Health Act of 1970 to employees who refuse to perform assigned work duties.

2. Whether the Petitioner unlawfully disciplined two of its employees for refusing to perform a particular assignment on July 10, 1974.

STATEMENT OF THE CASE.

Petitioner, Whirlpool Corporation (hereinafter "Whirlpool"), operates an appliance manufacturing plant in Marion, Ohio. The workforce numbers approximately 1,500; approximately 88 employees are assigned to various skilled and non-skilled maintenance jobs (Jt. Ex. 1, pp. 457-58).

This litigation was instit ted to challenge disciplinary action taken by Whirlpool against two maintenance employees because they refused to perform a normal plant maintenance work assignment during the night shift, July 10, 1974 (App. 2-4). The two employees were suspended for six hours following their refusal to work and later were issued formal disciplinary notices. Plaintiff seeks recovery of approximately $50.00 lost wages and removal of the disciplinary notices on behalf of the two employees (Tr. 23, 50; App. 3-4).

The refused work assignment was to recover materials from one area of a protective barrier suspended above the plant floor and generally referred to as the "guard screen."

Guard screen is installed in Whirlpool's plant (and generally throughout industry) to protect employees working beneath

overhead conveyors from being struck by materials which occasionally fall off the conveyors (Jt. Ex. 1, pp. 483-85, 499, 521). At the time the work refusal occurred, Whirlpool's guard screen covered 295,000 square feet (approximately 36% of the plant floor space) under a 65,000 linear foot conveyor system (Jt. Ex. 1, pp. 435, 522). At the time this case arose, approximately twenty-five percent 25% of the barrier guard screen in Whirlpool's plant was 16-gauge expanded steel mesh welded into 4′ x 8′ panels constructed of angle iron and reinforced at midpoint by metal strapping (Jt. Ex. 1, pp. 159, 488-94). The angle-iron panels were fastened to adjacent panels by ⅜″ round bolts (Jt. Ex. 1, pp. 492-3). Forty-two percent (42%) of the barrier screen was of the same basic construction but was further reinforced by addtional metal strapping (Jt. Ex. 1, p. 448). Thirty-three percent (33%) was constructed of wire mesh (not expanded steel) and fastened together by spiral wound connectors (Jt. Ex. 1, p. 459).[2] All of the screen panels are supported at six feet eight inch intervals by 2″ x 2½″ or 4″ x 4″ angle iron hangers affixed to the structural steel of the building. The height of the screen above the floor ranges up to twenty feet. Photographs of the barrier screens were introduced as Exhibit R-4, R-5.

The angle iron used for framing screen panels has a rated strength of from 20,000 to 24,000 pounds per square inch (Jt. Ex. 1, p. 494). Professional engineers who tested the strength of the screen mesh as installed in Whirlpool's plant found that the oldest, lightest and least reinforced screen mesh itself supported more than 600 pounds weight applied to a 12-inch area (simulating a human foot) and more than 300 pounds applied to a single point, with no indication of failure (Jt. Ex. 1, pp. 514-19 and associated Exhibit R-11).[3]

2. The latter type screen was being used to replace worn out screens of the former type because it was found to require less maintenance and was at least as sturdy (Jt. Ex. 1, pp. 459, 513).

3. These tests were of the strength of the screen mesh (as opposed to the angle iron frames or the angle iron hangers) and of the
(Footnote continued on next page.)

Maintenance, repair and replacement of the barrier guard screen are responsibilities of the plant Maintenance Department (Jt. Ex. 1, pp. 468-69). Employees of that department collectively average 15-30 hours per week physically climbing, walking or standing on the screen in the performance of that work (Jt. Ex. 1, p. 458). Skilled maintenance employees traversed the entire screen system at least once each month inspecting for defects (Jt. Ex. 1, pp. 208-10, 268-70, 281).

The two complainant employees whose refusal to work on July 10, 1974 gave rise to this case, and other maintenance personnel, regularly were required to clear the guard screen of materials which had fallen from the conveyors (Jt. Ex. 1, pp. 155-58; 173, 179, 209-212, 256, 268-70, 280-81, 468-69). One Complainant, Deemer, had performed that task on a daily basis during the eight-month period preceding July 10, 1974, the date he refused the assignment (Tr. 8, 28). The other Complainant, Cornwell, had retrieved fallen parts from the barrier screen at least once each work shift for several years prior to that date (Tr. 42-43, 54-55; Jt. Ex. 1, pp. 227, 239). Their Foreman, Price, had worked on the screens for seventeen years (Tr. 72-73). A number of other Maintenance Department employees testified that their normal duties also required them regularly to work on the screen structure (Jt. Ex. 1, pp. 154-56, 172, 187, 197-200, 209-10, 250, 267-70, 278-80).

However, neither the Complainants nor any other employee had refused to work on the screen prior to July 10, 1974 (Tr. 28, 58-59, 78-80). No employee other than the Complainants refused to perform work on the screen on that date—two other employees carried out the assignment after the Complainants refused (Tr. 80).[4] No employee including the Complainants has refused to work on the screen since July 10, 1974 (Tr. 56, 85).

(Footnote continued from preceding page.)
welding used to fasten the mesh to the frames (Jt. Ex. 1, pp. 514-19).

4. Both Complainants originally obtained Maintenance Department jobs by voluntary bid and with knowledge that the work in-
(Footnote continued on next page.)

On June 28, 1974 an employee fell from a section of guard screen, and thereby sustained fatal injuries. Following that event —the only major industrial accident to have occurred in the 20-year history of the plant (Jt. Ex. 1, pp. 415-16)[5]—employees temporarily were prohibited from walking on the screen structure pending investigation of the accident and inspection and repair of the screen (Tr. 13). A safety inspector of the Occupational Safety and Health Administration ("OSHA") inspected the guard screen on July 1 and July 5, 1974, following report of the fatality (Jt. Ex. 1, pp. 19-29). The inspector stated, at the conclusion of his inspection, that the accident

> "resulted from a mechanical failure and I can't see what you could have done to prevent it." (Jt. Ex. 1, 461-62, 435.)

Complainant Deemer testified that the temporary prohibition against screen work could not be made permanent; he knew it would be necessary "sooner or later" for him again to walk on the screen in order to retrieve fallen parts (Tr. 13-14, 22). Because he knew it would be necessary to resume guard screen work, Deemer, together with complainant Cornwell, requested to meet with his supervisor and the maintenance superintendent. The requested meeting was held on July 7, 1974, three full days prior to the date of the work refusal. During the meeting, the Complainants protested that the screen was unsafe, but when asked to particularize their concern and/or reconcile it with the fact that they regularly had been working on the

(Footnote continued from preceding page.)
cluded guard screen maintenance; neither sought to leave the department (Tr. 29, 55-56).

5. The record does not support references in the Court of Appeals opinion suggesting that guard screen accidents were common (C. A. 6). What the record does show are three recorded instances of employees falling *on* the screen (Jt. Ex. 1, p. 333 with reference to Exhibits C-7, C-9, C-10) and several recalled but not recorded instances of screen failure; the latter instances were recalled to have occurred in the period 1967-1969, long before July, 1974, and involved screen conditions which no longer existed in 1974 (Jt. Ex. 1, pp. 161-65, 175, 182, 231, 236-38).

screen for a long time, the Complainants stated they felt the work should be done by other, higher paid, employees and not by them (Jt. Ex. 1, pp. 466-68). (The supervisor testified that he understood the Complainants' screen safety comments at the meeting were intended to buttress a claim for more pay (Tr. 81)). At the trial, the Complainants stated that their object in requesting the meeting was to be relieved of guard screen duty altogether and to ask that such work be reassigned to other employees (Tr. 15, 38-39, 45).[6]

The meeting concluded upon the superintendent's reaffirmation that the work was and would continue to be part of the Complainants' jobs. He expressly responded to their questions about the safety of the screen, however, and directed the Complainants and their supervisor jointly to inspect the screen, to identify specific areas which they considered to be unsafe, and, if necessary, to arrange for repair of same (Tr. 15-16, 33, 60). That direction was carried out the next day (Tr. 33).

On July 9, 1974, more than one full day prior to the work refusal,[7] Complainant Deemer telephoned OSHA Area Director Peter Schmidt to ask if he (Deemer) "had to walk on the guard screen" (Tr. 17-18, 38). As noted above, that contact was preceded, on July 1 and 5, 1974, by an inspection of the guard screen conducted by an OSHA safety inspector assigned by the Area Director; the inspector had discussed the condition with the Area Director prior to July 9 when Deemer called (Jt. Ex. 1, pp. 19-29). The Area Director did not, however, initiate a special inspection as is provided for under the Act, Section 8(f), when there are reasonable grounds to believe that an

6. The Complainants' version is inconsistent with other testimony given by them. *I.e.*, Deemer admitted later that he did not think all of the screen was unsafe (Tr. 26). Cornwell admitted the same thing (Tr. 53) and that he was in fact not afraid to walk on properly maintained screen (Tr. 60-62).

7. The Complainants were assigned to work the 11:00 p.m.-7:00 a.m. shift.

"imminent danger" exists; nor did he seek an "imminent danger" shutdown order as is provided for under Section 13 of the Act.[8]

On July 10, 1974, the Complainants' supervisor, acting on instructions given by the maintenance superintendent, personally walked back and forth across the guard screen in an area of the plant known as the bulkhead service line (Tr. 76-78; 85). The supervisor thus walked on the screen for 15 minutes at that time in the presence of the Complainants in order to inspect for defects and to physically demonstrate to them that the screen was safe (Tr. 31, 40, 48, 76-78). The Complainants frequently had walked on that screen in the past (Tr. 54-55). After thus personally testing and inspecting the area, the supervisor assigned the Complainants to clear fallen materials from the area he had just inspected in their presence (Tr. 30, 48-49, 78).[9]

Notwithstanding, the supervisor's physical demonstration of the screen safety (and notwithstanding the prior joint inspection of the screen following the July 7 meeting) the Complainants refused to accept the assignment (Tr. 78). When asked to explain the refusal, Deemer stated that it was unsafe, and when

8. The Area Director did later issue to Whirlpool a citation which alleged the existence of an "unsafe walking/working surface on the screens under the conveyors." Whirlpool successfully contested that citation before an administrative law judge, who twice recommended it be vacated. The administrative proceeding ultimately was concluded by an Order of the Occupational Safety and Health Review Commission dated May 11, 1979. By that Order, the Review Commission overruled two earlier orders entered by the Administrative Law Judge who had vacated the citation and sustained the citation, but directed that the alleged violation be corrected within six months after date of the Order. *Secretary of Labor* v. *Whirlpool Corporation,* 7 OSHC 1356 (BNA, 1979). By an earlier interim ruling, the Commission had found no evidence of violation in connection with the condition which resulted in the fatal accident. *Secretary of Labor* v. *Whirlpool Corporation,* 5 OSHC 1173 at fn. 1 (BNA, 1977). Whirlpool has appealed from the OSHRC decision to the Court of Appeals for the District of Columbia *Whirlpool* v. *O. S. H. R. C.,* No. 79-1692 (D. C. Cir. 1979).

9. The assignment would have required approximately one hour to complete (Tr. 78).

asked what area was unsafe, he replied that it was all unsafe (Tr. 79). Following a second request that the Complainants perform the assignment, and a second categoric refusal, the supervisor took the Complainants to the personnel office (Tr. 22, 48, 80). After hearing the facts, the personnel officer directed that they leave work for the remainder of the shift and report back to the personnel office the following morning. At that time, the Complainants were issued written warnings (Compl. Exs. 1, 2).[10]

Following the refusal by Complainants to clean the bulkhead service line screen, two other employees performed the task without protest (Tr. 80).

Although the Complainants on July 10, 1974 protested that the screen universally was unsafe, they modified their positions at the trial of this case. Under oath, Deemer admitted:

> "I didn't consider everything unsafe, all the guard screen unsafe. I made a statement to [that] effect . . . but I was a little hot under the collar at the time." (Tr. 26),

and

> "My being mad is why I made the statement that all the guard screen was unsafe and I wouldn't walk on it that night." (Tr. 36).

Complainant Cornwell admitted:

> Q. "Mr. Cornwell, did you consider the guard screens in the whole plant to be unsafe?
> A. "No, I really didn't. (Tr. 53),

* * * * *

10. The warnings stated:

"At approximately 11:30 P.M., last night, you were assigned the task of cleaning parts off the bulkhead service line guard screen. Even though your Foreman, Gale Price, personally checked the guard screen to insure that the task could be performed safely, you refused to perform the designated work, even though you have been performing this same task for approximately one year. This refusal to perform designated work is a violation of policy 10.13(h) of *A Statement of Wages, Hours and Working Conditions.*"

Q. "Are you opposed per se to working on the guard screen?

A. "No. (Tr. 60),

* * * * *

Q. "As evidenced by your continuing activities on the guard screen, you are not opposed to walking on all three types of guard screen if it is properly maintained, is that correct?

A. "Yes." (Tr. 61)

The entire guard screen system regularly (at least once a month) was traversed by a skilled maintenance employee who inspected for defects (Jt. Ex. 1, pp. 208-10). Other skilled employees also were responsible to inspect for and to repair screen defects (*e.g.*, Jt. Ex. 1, pp. 268-70, 281). In addition, Whirlpool was implementing a screen replacement program at the time of the events described above (Jt. Ex. 1, pp. 223, 459, 513).[11]

A number of employee witnesses who testified in the citation proceeding, and who frequently work on the guard screen stated that they believed the screen to be safe (Jt. Ex. 1, pp. 165, 168, 183, 211-12, 281-82, 287-88).

The Secretary instituted this action pursuant to Section 11(c)(1) of the Occupational Safety and Health Act of 1970 and regulations promulgated thereunder. Section 11(c) prohibits an employer from discharging or in any manner discriminating against any employee "because of the exercise by such employee . . . of any right afforded by this Act."[12] The Secretary

11. Indeed, after their refusal to work, both Complainants applied for jobs associated with that program (Tr. 25-26; 51). One was successful; the other was unsuccessful because of relative seniority (Tr. 25-26; 51-53).

12. "Section 11(c)(2) of the Act, 29 U. S. C. 660(c)(2), in pertinent part, provides that:

> "[A]ny employee who believes he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination.

(Footnote continued on next page.)

alleges that Whirlpool unlawfully disciplined the Complainants for refusing to clean the guard screen on July 10, 1974. The Secretary has argued that the Complainants' asserted belief that the screen was unsafe served to insulate them against disciplinary action imposed by Whirlpool for refusing to perform the work because such refusal was an exercise of a "right afforded by this Act" within the meaning of Section 11 of the Act as construed by the Secretary's regulation, quoted above.

The District Court entered judgment for Whirlpool based upon the conclusion "that the regulation in question is clearly inconsistent with the statute and therefore invalid" (C. A. at A47). The District Court stated that "[t]he reason for this holding is that the Congress squarely faced the issue as to whether or not employees should be permitted to leave the job when faced with a dangerous situation and decided that they should not" (C. A. at A47).

On appeal by the Secretary, the Court of Appeals for the Sixth Circuit observed that "[t]wo district courts below ruled that this regulation is invalid because it has no statutory support and because OSHA's legislative history reveals Congressional intent at odds with the regulation" (C. A. at A2).[13] The Court of Appeals, however, was unpersuaded by the District Court decisions and reversed those judgments based upon the twofold

(Footnote continued from preceding page.)

> "The Secretary shall cause such investigation as he deems appropriate. If . . . the Secretary determines that . . . this subsection ha[s] been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the . . . courts shall have jurisdiction . . . to restrain violations of [11(c)(1)] and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay."

13. The Secretary's appeal of the District Court's decision to the Sixth Circuit was consolidated with his appeal from two other District Court decisions adverse to his position. *Brennan* v. *Diamond International Corp.*, 5 OSHC 1049 (BNA S. D. Ohio, 1976); and *Brennan* v. *Empire-Detroit Steel Division, Detroit Steel Corporation*, No. C-1-74-345 (S. D. Ohio, 1976). The Secretary later dismissed his appeal in the *Diamond International* case.

finding "that the Secretary's regulation is consistent with the stated purposes of the Act and its legislative history, and that it represents an appropriate employment of the regulation power conferred upon the Secretary by Statute . . ." (C. A. at A2).

The Court of Appeals then remanded the case to the District Court for further proceedings consistent with its opinion.

SUMMARY OF ARGUMENT.

The Act does not expressly afford employees a protected right to refuse work. Congress squarely was presented with a legislative option to extend the protections of the Act to work refusals or stoppages, but rejected all such proposals.

Congress did include within the Act a mechanism to deal with conditions which employees may believe to be imminently dangerous, which mechanism the legislative history clearly shows was adopted in lieu of proposals to protect employees who refuse work for reasons of safety or health.

The Secretary's regulation, purporting to extend the protections of the Act to employee work stoppages, is therefore plainly inconsistent with the will of Congress as expressed in the Act and legislative history. In turn, the Court of Appeals' finding that the Secretary's regulation is consistent with the Act and with Congressional intent as manifested in the legislative history is clearly erroneous as a matter of law. The Court has disregarded the established principle that a patent inconsistency between a regulation and a statute must be resolved in favor of the statute. It has ignored the principle repeatedly recognized by this Court, that a legislative choice to create one form of remedy implies that a decision has been made to exclude other forms of remedy.

Indeed, the Secretary's own intepretation of Section 11(c)(1) begins with the revealing admission that "[r]eview of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace." 29 C. F. R. 1977.12 (b)(1), *supra* (C. A. at A56-7).

The Court's decision proceeds from complete disregard of the facts set forth in the record. It fails to recognize that the Secretary's regulation not only is inconsistent with all recorded expressions of Congressional will, but also clearly provides the basis for potential abuse, setting up the potential for endless litigation in Federal Courts over labor matters otherwise relegated to other forums.

The Court of Appeals misstated and/or ignored the undisputed facts of the case to an extreme degree in order to create a factual justification for its decision. The Court created an urgent, no-recourse situation where none existed in fact. Based upon the record facts, the Court should have dismissed the complaint for failing to establish the elements essential to obtaining protection under the regulation.

ARGUMENT.

I.

THE OCCUPATIONAL SAFETY AND HEALTH ACT DOES NOT EXPRESSLY PROTECT EMPLOYEES FROM THE EMPLOYMENT CONSEQUENCES OF REFUSING TO PERFORM WORK.

The Secretary admits within his regulation that no provision in the Act expressly affords employees the right to refuse work assignments without regard to the employment consequences of such actions 29 C. F. R. § 1977.12(b)(1), *supra.* Thus, the question to be resolved is whether the Secretary may create such a right by administrative fiat.

Section 11(c) of the Act protects an employee from discriminatory action if he is in the exercise of "any right afforded by this Act." Section 11(c)(1) itself creates one of these rights, *i.e.* the right to file a complaint or institute a proceeding under the Act or give testimony in such a proceeding. The Act elsewhere creates numerous other rights *vis a vis* their employers:

1. the right to receive notice of application for a variance from a standard (Sections 6(b)(6)(a) and 6(d), 29 U. S. C. § 655(b)(6)(A) and 655(d));

2. the right to petition for a hearing on an application for a variance (Sections 6(b)(6)(A) and 6(b)(6)(B), 29 U. S. C. § 655(b)(6)(A) and 655(b)(6)(B));

3. the right to participate in hearings on application for a variance (Section 6(d), 29 U. S. C. § 655(d));

4. the right to apply for modification or revocation of a rule or order granting a variance (Section 6(d), 29 U. S. C. § 655(d));

5. the right to challenge the validity of a standard issued by the Secretary (Section 6(f), 29 U. S. C. § 655(f);

6. the right to be advised of citations issued (Section 9(b), 29 U. S. C. § 658(b));

7. the right to contest a hazard abatement period set by the Secretary (Section 10(c), 29 U. S. C. § 659(c));

8. the right to participate as parties in hearings on citations (Section 10(c), 29 U. S. C. § 659(c));

9. the right to petition the court of appeals to review final orders of the Review Commission (Section 11(a), 29 U. S. C. § 660(a)).

The Act also creates employment rights in connection with provisions for compliance and "imminent danger" inspections. Such rights include a right to be informed that an inspection is underway (Section 8(c)(3); 29 U. S. C. § 657(c)(3)); a right to notify inspectors of violations (Section 8(f)(2); 29 U. S. C. § 657(f)(2)); a right to request special inspections (Sections 8(f)(1) and 13(c), 29 U. S. C. §§ 657(f)(1) and 662(c)); a right to consult privately with inspectors (Sections 8(a)(2) and 8(e), 29 U. S. C. §§ 657(a)(2) and 657(e)); and right to accompany inspectors (Section 8(e), 29 U. S. C. § 657(e)).

With respect to imminent dangers, the Act requires OSHA to conduct a prompt investigation upon the request of an employee, to inform the employee promptly as to the result of such investigation, and, if necessary, to obtain judicial intervention (Section 8(b)(1), 29 U. S. C. § 657(b)(1)). If the Secretary fails to seek judicial relief from an imminent danger, the employee may bring his own action in federal court. (Section 13(d), 29 U. S. C. § 662(d)).

The fact that so many rights are set forth in the Act reveals that Congress gave great consideration to employee rights in its deliberations. Accordingly, the absence of a provision granting

employees the right to refuse to perform assigned tasks without resort to expressly established statutory procedures clearly is reflective of a Congressional intent not to legislate immunity from a work assignment refusal or to give employees a right to shut down jobs. Indeed, the Act withholds that right from even the inspectors or the Secretary himself, and gives it only to the federal courts.

Nor can it be argued that the right extended to employees in the Secretary's regulation is merely "incidental." To afford individual employees absolute immunity—in terms of pay or discipline—from the effects of refusing a work assignment would reflect monumental change in prevailing labor policy. This entire area is part and parcel of the National Labor Relations Act, as amended, where it is the subject of express legislation. For example, employees may not be fired or disciplined for engaging in a strike under Section 7 of the NLRA, which grants employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." An employer commits an unfair labor practice under Section 8(a)(1) of the NLRA when it interferes with, restrains or coerces employees in the exercise of their Section 7 rights. These rights include the right to strike over safety hazards without reprisal. *See NLRB* v. *Washington Aluminum Co.*, 370 U. S. 9 (1962).

Furthermore, Section 502 of the Labor-Management Relations Act, 29 U. S. C. § 143, provides:

> "[N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter."

As recognized by the Supreme Court in *Gateway Coal Co.* v. *United Mine Workers of America*, 414 U. S. 368, 385 (1974), Section 502 provides a limited exception to any express or implied no-strike obligation, allowing employees to walk out in

abnormally dangerous situations without triggering a suit for contract breach or for injunction. *See also NLRB* v. *Knight Morley Corp.*, 251 F. 2d 753 (6th Cir. 1957).

But neither of these two sections has ever been construed to create a right to refuse work without loss of pay.[14] To allow employees to withhold services without loss of pay would be to remove employee-employer disputes from the collective bargaining arena envisioned by the NLRA. Labor unions would thereby be possessed of an economic weapon which employers could not hope to match and which was never intended under the NLRA. The Secretary's regulation invites continuous labor unrest under the pretext of an OSHA-related strike.

The absence of any express provision in the OSH Act dealing with refusal to work, the inclusion of numerous other protected employee activities, and the express provisions on work refusals in other legislation, clearly indicates that Congress did not intend to create a protected right to refuse work as part of this legislation.[15]

14. There is no merit in the Court's attempt to distinguish the Secretary's regulation from the "strike with pay" provision which was rejected by Congress (C. A. at A26-A29, A35). Indeed, the Court's conclusion that an employee must be prepared to forego pay if necessary to escape the hazard (C. A. at A36) is completely contradictory to the interpretation of Section 11(c)(1). Clearly, if the employee has a "right" to refuse to work because he believes that there is a hazard, denial of pay would certainly be considered discriminatory under Section 11(c)(1).

15. The Court of Appeals relied upon the Federal Mine Safety and Health Amendments of 1977, 91 Stat. 1290, 30 U. S. C. § 801, *et seq.*, in upholding the Secretary's regulation. The Court stated (C. A. at A36-37):

> "Our conclusion is reinforced because when Congress subsequently directly addressed this question, when considering the Federal Mine Safety and Health Amendments of 1977, 91 Stat. 1290, 30 U. S. C. § 801 *et seq.*, it expressly indicated that a miner could refuse to work if he had a good faith belief that his job would subject him to unsafe or unhealthful working conditions. As here, the Mine Safety and Health Act does not expressly provide for that right." (Footnotes omitted.)

(Footnote continued on next page.)

II.

THE OCCUPATIONAL SAFETY AND HEALTH ACT DOES NOT IMPLIEDLY PROTECT EMPLOYEES FROM THE EMPLOYMENT CONSEQUENCES OF REFUSING TO PERFORM WORK.

A. Congress Squarely Was Presented with Proposals to Protect Safety-Related Work Refusals and Decided Not to Include Work Refusals as a Right Protected by the Act.

The Secretary's regulation (29 C. F. R. § 1977.12(b)(1)) acknowledges that the legislative history[16] indicates that Congress did not intend to protect employees in refusing work assignments. The Secretary now contends, however, that nothing in that history counter-indicates the existence of that right. However, the legislative history of this Act clearly reveals that Congress did squarely consider and did ultimately reject the proposition.

The history of the Act began in the Senate with introduction of Senate bill S. 2193 (the "Williams" bill) which was favored by organized labor and which ultimately proved to be the precursor of the final legislation, and with introduction of Senate bill S. 2788 (the "Administration" bill).[17]

(Footnote continued from preceding page.)

However, the Court's reliance upon the 1977 Amendments to the Federal Mine Safety and Health Act is misplaced. If Congress intended to extend the same right of refusal to the Occupational Safety and Health Act, it would have included such a right in the Act as originally enacted or simply amended the Act to provide such a right.

16. The legislative history of the Act is found in Subcommittee on Labor, Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print June, 1971), referred to in this brief as "Leg. Hist." The Senate report and the Senate-House Conference report are also found in U. S. Code Cong. Admin. News, 91st Cong., 2d Sess. 5177-5241 (1970).

17. The concept of a federal Occupational Safety & Health Act germinated during the Johnson Presidency, but the bill put

(Footnote continued on next page.)

Apropos the question of work place shut down and/or cessation of work, the Williams bill originally would have given the Secretary of Labor authority to issue an immediate stop-work or shut-down order where an "imminent danger" existed, provided there was not time to obtain a court order. In contrast, the Administration bill proposed a National Occupational Safety & Health Board to write standards, which would be enforced by the Secretary, who would bring his complaint before the Board, which would order compliance if a violation was found. The Board's order would be enforced by court action, upon the initiative of the Secretary.

In the House of Representatives, four bills were introduced: the Administration bill (H. R. 13373), Leg. Hist. at 679-699, Representative William Hathaway's bill (H. R. 843), Leg. Hist. at 610-611, Representative James O'Hara's bill (H. R. 3809), Leg. Hist. at 640-641, and Representative Carl Perkins' bill (H. R. 4294), Leg. Hist. at 664-665. The House Administration bill differed from the Hathaway, O'Hara and Perkins bills by placing standard setting and enforcement power in an independent Board instead of with the Secretary of Labor, and required the Secretary to resort to the courts in imminent danger situations, H. R. 13373, §§ 8(b), (d), Leg. Hist. at 697-699; conversely, the three other bills authorized administrative issuance of cessation-of-work orders. H. R.843, § 6(a)(2), Leg. Hist. at 610-611; H. R. 3809, § 6(a)(2), Leg. Hist. at 640-641; H. R. 4294, § 6(a)(2), Leg. Hist. at 664-665.

Extensive hearings were conducted in each chamber. Among those offering testimony were Secretary of Labor George P. Schultz, Undersecretary of Labor James Hodgson, and Labor

(Footnote continued from preceding page.)
forward by that Administration in 1968 failed to win support. The following year, President Nixon proposed new legislation. See generally: Brown, *A Law is Made—the Legislative Process in the Occupational Safety & Health Act of 1970,* 25 Labor L. J. 595, 598 (Oct. 1974).

Solicitor Lawrence Silberman, who principally were responsible for preparation of the Administration's proposals.[18]

In testimony before the House Labor Committee, Secretary Schultz expressly defended those provisions of the Administration bill which required resort to the District Courts in imminent danger situations as offering a more acceptable solution than § 6 of the Perkins bill, H. R. 4294, and similar proposals (*supra*), which would have authorized the inspector to issue a "stop order" on the scene. Secretary Schultz argued that in most cases the employer would voluntarily correct the problem, and that any recalcitrant employer who might refuse to take steps when the situation was pointed out would most likely not honor an inspector's cessation-of-operations order, so that resort to court proceedings would be necessary in any event. Secretary Schultz urged instead that an inspector's request, backed by the implicit threat of immediate litigation, would not only be more palatable to the business community, but also more likely to secure voluntary, and therefore speedier, removal of the hazard with less opportunity for loss of life or limb. *Hearings before the House Select Subcommittee on Labor,* at 400.

In contrast, I. W. Abel, President of the Industrial Union Department, AFL-CIO, who was accompanied by Jacob Clayman, Administrative Director, I. U. D., AFL-CIO, testified before the same Committee in favor of the O'Hara bill, H. R.

18. Testimony of Honorable George P. Schultz, Secretary of Labor, Honorable James Hodgson, Undersecretary of Labor, and Lawrence Silberman, Solicitor, Office of the General Counsel. Hearings before the Select Subcommittee on Labor of the Committee on Edudcation and Labor, House of Representatives, 91st Cong., 1st Sess., at 111-441 (September 24, 1969); Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, Senate, 91st Cong., 1st Sess., at 76 (September 30, 1969).

19. Hearings before the Select Subcommittee on Labor of the Committee on Education and Labor, House of Representatives, 91st Cong., 1st Sess. (September 30, 1969); Testimony of Jacob Clayman, Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, Senate, 91st Cong., 1st Sess. (November 26, 1969).

3809, and against the Administration bill.[19] Mr. Abel pointedly contrasted the O'Hara bill which "would permit the Secretary of Labor to order an immediate halt to such an operation and removal of all workers from the location except those assigned to remove or correct the dangerous situation," with the Administration bill which would require the Secretary to seek a temporary injunction, a procedure which Mr. Abel branded as "far more subject to fatal delay, such as finding a judge on a summer Sunday." *Hearings, supra,* at 655; Testimony of Jacob Clayman, Subcommittee on Labor (Senate), at 428-9, 435-6.

Thus, it is apparent that neither the Secretary nor the Industrial Union Department considered that any of the proposed bills would give employees the right, on their own initiative, to remove themselves from danger pending administrative or court-ordered relief. Nor did any member of the subcommittee call this possibility to their attention. In similar circumstances, this Court recently observed:

> "Although the transcript of the House Committee hearings does not indicate that any Committee member voiced explicit affirmative agreement with this interpretation, it is surely most unlikely that the members of the Committee would have stood mute if they disagreed with it." *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers,* 414 U. S. 453, 460 (1974).

1. House Action.

The House Education and Labor Committee ultimately reported out a bill, H. R. 16785, 91st Cong., 2d Sess. (1970), Leg. Hist. at 726. See H. Rep. No. 91-1291, 91st Cong., 2d Sess. (1970), Leg. Hist. at 831. This bill was sponsored by Representative Daniels, Leg. Hist. at 721, (the "Daniels bill).

The Daniels bill as reported compromised on the imminent danger issue by providing that the Secretary's inspectors were empowered to "issue an order prohibiting the employment or presence of any individuals in locations or under conditions

where such an imminent danger exists, except to correct or remove [the danger]." H. R. 16785, § 12(a), Leg. Hist. at 955. The inspector's cessation order would remain in effect for no more than five days. *Id.;* Leg. Hist. at 955-956. Resort to the District Court would be necessary to obtain longer relief. § 12(b), Leg. Hist. at 956. The bill also provided that if the Secretary "arbitrarily or capriciously . . . fails to issue an order 'in an imminent danger situation' and 'any person is injured . . . physically . . . by reason of such . . . failure to issue such order,' " such "person may bring an action against the United States in the Court of Claims in which he may recover the damages he has sustained. . . ." § 12(c), Leg. Hist. at 956-57.

Secondly, the Daniels bill contained an elaborate provision which became known as the "strike-with-pay" clause. This provision would have required employers to take specified steps to assure that no employee would suffer an impermissible exposure to toxic substances ". . . unless such exposed employee may absent himself from such risk of harm for the period necessary to avoid such danger without loss of regular compensation for such period." § 19(a)(5), Leg. Hist. at 969-70. The Committee justified this provision of the Daniels bill by saying that "[t]here is still a real danger that an employee may be economically coerced into self-exposure in order to earn his livelihood, so the bill allows an employee to absent himself from that specific danger for the period of its duration without loss of pay." H. R. Rep. No. 91-1291 at 30, Leg. Hist. at 860.

When the Daniels bill reached the floor of the House, its critics offered another bill, H. R. 19200, 91st Cong., 2d Sess. (1970), which was introduced by Representative Steiger as an amendment in the nature of a substitute, H. Res. 1218, 91st Cong., 2d Sess. (1970), Leg. Hist. at 977 (the "Steiger" bill). Under the Steiger bill, only the federal courts would have power to issue immediate-cessation orders in imminent danger situations. H. R. 19200, § 12, Leg. Hist. at 796-98. It did not contain the controversial "strike-with-pay" provision.

To counter support for the substitute Steiger bill, Representative Perkins, Chairman of the House Education and Labor Committee and floor leader for the Daniels bill, stated that if the Steiger bill were defeated he would offer a series of amendments compromising several of the most controversial features of the Daniels bill. 116 Cong. Rec. 38369, Leg. Hist. at 985-987. The offered amendments would (1) require the Secretary to seek a court order to bring about a shutdown of operations and (2) delete the "provision that would have permitted an employee to absent himself from exposure to a toxic substance without loss of pay, the so-called 'strike-with-pay' provision." 116 Cong. Rec. 38369, Leg. Hist. at 986 (Perkins); 116 Cong. Rec. 38376, Leg. Hist. at 1005 (Daniels).

Some of the Daniels bill proponents were opposed to the compromise amendments. Thus, Congressman Cohelan urged:

> "[A] comprehensive occupational safety and health program must be based on the individual rights of the worker. It must permit the worker to leave his post whenever and wherever conditions exist that endanger his health or safety. The worker must be guaranteed procedural safeguards in order to take corrective action in removing such dangers. Therefore, passage of this measure before this Chamber today is vital and necessary as all of these aspects of a comprehensive safety and health program as provided for in H. R. 16735." 116 Cong. Rec. 38375, Leg. Hist. at 1001.

Others continued to urge passage of the Steiger bill notwithstanding the Daniels bill amendments. "[E]ven if the amendments offered by [Congressman Daniels] are passed, you still do not have a perfect bill." 116 Cong. Rec. 38708, Leg. Hist. at 1073 (Steiger). Representative Steiger further stated:

> "Let me emphasize again, *there is nothing in our bill which authorized strikes without pay.*" (Emphasis supplied.) 116 Cong. Rec. 38708, Leg. Hist. at 1074.

Thus, the debate in the House of Representatives reveals that Congress was in fact presented with a clear policy choice with

respect to protecting employees' refusals to perform work, did thus consider the situation at issue in the case at bar, and rejected the philosophy which now is embodied in the Secretary's regulation.[20]

As the final vote drew near, Daniels offered a set of five amendments to his bill and, in relevant part, described them as follows:

> "What do these amendments do?
>
> * * * * *
>
> *"Second, in imminent danger situations, the Secretary will now be required to get judicial relief. We have eliminated the provision under which a plant could be closed by an administrative order.*

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20. It is important to note that the Court of Appeals relied very heavily on the fact that its review of the legislative history did not disclose any reference to strike *without* pay. As the Court stated in Footnote 35 of its opinion (C. A. at A27):

> "We consider it significant that every time that the question of employees walking off the job was addressed, it was always in the 'with-pay' context . . ."

The Court did not attempt to reconcile that view with existence in the legislative history of Representative Steiger's comments that his bill, which formed the basis of the Act, did not authorize strikes *without* pay or with Representative Cohelan's comments with reference to the right of workers to walk off the job in any and all situations where they were exposed to danger. The Court's decision obviously is predicated on a view that Congress *should* have given employees the right to walk off the job. This influence on the Court's decision can best be seen by an examination of Footnote 22 (C. A. at A18) of its opinion where the Court attempted to rationalize the implication of a common law right on behalf of an employee faced with an imminent danger situation notwithstanding that Section 4(b)(4) of the Act expressly provides that nothing in the Act shall be construed "to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." The Court's apparent willingness to imply such a right in the face of such clear Congressional language is ample testimony to its willingness to construe the statute and the legislative history to meet its own ideas of what the Congressional policy *should* have been. A fair reading of the legislative history shows that Congress did not intend to protect workers who refuse to work.

"Third, we have deleted a provision which was—though inaccurately—called a 'strike with pay' provision and have provided that employees may request an inspection when they are subjected to dangers at the workplace." (Emphasis supplied 116 Cong. Rec. 38707, Leg. Hist. at 1071.

In addition, Representative Daniels inserted the following statement in the Congressional Record:

"Request for Inspection Amendment

"1. *Explanation:*

This amendment provides that employees may request an inspection by giving the Secretary written notice of the safety violations that threaten physical harm or imminent danger. The amendment requires the Secretary to make a special inspection as quickly as possible if he concludes that there are reasonable grounds to believe that such danger exists.

"2. *Justification:*

This amendment is a substitute for the provision in Section 19 of the committee bill permitting employees to absent themselves from dangerous situations without loss of pay. When we get to Section 19 I will offer an amendment to delete that provision.

"The provision on employees not losing pay was so generally misunderstood that we have decided to drop it. *We have no provision for payment of employees who want to absent themselves from risk of harm; instead we have this amendment which enables employees subject to a risk of harm to get the Secretary into the situation quickly.* Instead of making provisions for employees when their employer is not providing a safe work place, we have strengthened the enforcement by this amendment provision to try and minimize the amount that employees will be subject to the risk of harm." (Emphasis supplied.) 116 Cong. Rec. 38377-38378, Leg. Hist. at 1008-1009.

Despite these assurances that the Daniels bill no longer contained a right to refuse work provision, the House voted 220-172, to adopted the Steiger bill, *which did not at any time include a work refusal provision.* 116 Cong. Rec. 38723 Leg. Hist. at 1112-15. The amended bill then passed by an overwhelming vote of 383 to 5. 116 Cong. Rec. 38724, Leg. Hist. at 1115-16.

2. Senate Action.

The Senate Committee on Labor and Public Welfare reported out a revised version of the Williams bill on October 6, 1970. As reported, the Committee bill did not contain a "strike-with-pay" provision. Instead, it provided that in imminent danger situations, an employee had the right to make a written request for an immediate inspection. S. 2193 § 8(f)(1), Leg. Hist. at 252-53. The inspector, however, was given authority to issue an immediate 72-hour cessation-of-work order under that proposal. *Id.*, § 11(b), Leg. Hist. at 262-63. If the inspector arbitrarily refused to issue such an order, the employee was given the right to bring an action in the District Court for a writ of mandamus to compel the Secretary to issue a cessation-of-work order and for other appropriate relief. § 11(c), Leg. Hist. at 264.

Debate on the Committee (Williams) bill opened in the Senate with remarks by its sponsor, who made a brief presentation of the bill's features. 116 Cong. Rec. 37324-27, Leg. Hist. at 411-419. With respect to the Committee bill's treatment of employees' right to walk off the job, Senator Williams stated:

"I should also add, despite some widespread contentions to the contrary, that *the committee bill does not contain a so-called strike-pay provision. Rather than raising a possibility for endless disputes over whether employees were entitled to walk off the job with full pay, it was decided in committee to enhance the prospects of compliance by the employer through such means as giving the employees the right to request a special Labor Department investigation or inspection.*" 116 Cong. Rec. 37326, Leg. Hist. at 416.

As in the House, having failed to obtain Committee endorsement of its original proposal, the Administration put forward a compromise bill (S. 4404), which was sponsored by Senator Peter Dominick. S. 4404, 91st Cong., 2d Sess. (1970), Leg. Hist. at 73. Senator Williams addressed the difference in approach to the imminent danger shutdown question taken by his bill and the Administration's compromise bill:

> "The committee bill, while guarding against frivolous complaints, permits employees or their representatives to request inspections where they believe that a violation of a safety and health standard exists that threatens physical harm or that an imminent danger exists.
>
> "The substitute bill has absolutely no comparable provision *for what in so many clearly life and death instances is the minimum assurance to which the employee is entitled.*" (Emphasis added.) 116 Cong. Rec. 37340-41, Leg. Hist. at 432-433.

In short, Senator Williams took the position that the Act should provide at least this "minimum assurance"—in view of the fact that the Act would not contain the greater assurance of an employee right-to-leave the danger area.

Senator Williams also stressed the differing approaches of the committee bill, which bore his name, and the Administration bill, which had the support of the Secretary of Labor, on the issue of who should have authority to issue stop-work orders:

> "The committee bill also permits the Secretary if he determines that the danger of death or serious harm is so immediate that action must be taken without awaiting the institution of court proceedings, to order such action to be taken and his order may remain in effect for 72 hours.
>
> "This is one of the areas in which there is clearly a distinction between the bill as reported by the committee and the substitute proposed. These are the true emergency situations where time manifestly is of the essence.
>
> * * * * *

> "The substitute's limitation on the Secretary's freedom to act fails to consider that the time consumed in unnecessary legal steps may be the difference between life and death of the worker.
>
> "It is obvious that in most cases, employers will recognize the gravity of the danger and will voluntarily close down a machine or a process.
>
> "However, in those few cases where the employer refuses, it is imperative that the Secretary retain this important authority.
>
> "To repeat, in most cases the employer would or will recognize the gravity of the danger and, we would think, would voluntarily close down; but in those cases where that does not happen, the Secretary, under the committee bill, retains this most important authority." *Id.*

Thus, as debate progressed, all proposals for protected work refusals were abandoned in favor of expedited inspections by federal officers.

The Senate Labor Committee's bill, sponsored by Senator Williams, passed the Senate by an overwhelming 83-3 roll call vote. 116 Cong. Rec. 37632, Leg. Hist. at 528.

3. Conference Committee Action.

In the House-Senate conference, the Senate was largely successful in retaining the provisions of the Williams bill. In particular, the Senate conferees successfully obtained House acquiescence in the request for inspection provision, which created an employee right to trigger an immediate inspection in imminent danger situations—although this right had been specifically rejected in the House. The Senate receded, however, on the issue of whether the Secretary should have the power to issue cessation-of-work orders in imminent danger situations, agreeing to the House version giving such power only to the federal courts.

The Senate accepted the conference report by voice vote on December 16. 116 Cong. Rec. 41764, Leg. Hist. at 1150 The

House likewise accepted the Conference Report on the following day, by a 309-60 roll call vote. 116 Cong. Rec. 42209, Leg. Hist. at 1225-28.

The legislative history of this Act thus demonstrates conclusively that both houses of Congress expressly considered but rejected proposals to create a protected right for employees to quit work as a means of furthering the legislative scheme. Congress instead adopted the request-for-inspection provision, backed up with potential federal court intervention at the behest of employees or the Secretary. The Court of Appeals' conclusion that the Act contains an implied protected right to refuse to work utterly disregards the clear intent of Congress to avoid creating just such a right. That intent is manifest from the statement of Senator Williams and from the concessions of Representative Daniels. To repeat the statement made by Representative Daniels as he tried to persuade the House to pass his bill, which he had offered to amend to conform much more closely to the Act as it finally emerged from Congress:

> "We have no provision for payment of employees who want to absent themselves from risk of harm; *instead we have this amendment which enables employees subject to a risk of harm to get the Secretary into the situation quickly.*" (Emphasis added.)

The Secretary attempts within his regulation to deal with an urgent situation where resort to the statutory procedure may be insufficient. As the legislative history shows, however, Congress rejected entirely and categorically all proposals to protect work refusals. The regulation thus flies directly in the face of Congressional intent, however limited in scope the Secretary intended it to be.

The Court of Appeals has also ignored the well-reasoned decisions of two other Circuit Courts of Appeals and several District Courts. In *Marshall* v. *Daniel Construction Co.*, 563 F. 2d 707 (5th Cir. 1977), *cert. denied*, ... U. S. ....., 99

S. Ct. 216 (1978), the Fifth Circuit Court of Appeals held that the Secretary exceeded his authority in promulgating the regulation, reasoning from the Act's legislative history that Congress did not intend employees to have the right to refuse work assignments. In striking down the Secretary's regulation, the Court stated:

> ". . . it expressly confers upon employees a right that Congress deliberately chose not to grant to OSHA inspectors: the right to determine in fact that an employment practice or condition presents 'a real danger of death or physical injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory procedures.' 29 C. F. R. § 1977.12(b)(2) (1976). Moreover, by permitting employees to refuse work upon making such a determination, the regulation provides them authority equivalent to that of an OSHA inspector when issuing an administrative stop work order—a right which Congress also deliberately withheld from OSHA inspectors. A worker's abuse of the authority afforded under the regulation could disrupt or cripple an employer's business. The legislative history is manifest that Congress feared such a result. We hold that the regulation exceeds the Secretary's scope of authority to promulgate regulations as granted under the Act." (Footnote deleted.) 563 F. 2d at 714-15.

In *Marshall* v. *Certified Welding Corp. and Wycon Chemical Corp.*, 7 OSHC 1069 (BNA, 10th Cir. 1978), the Tenth Circuit Court of Appeals upheld a district court ruling that the discharge of an employee for refusing to work in an area be believed to be unsafe did not create a cause of action under the Act and could not be considered a protected activity. Several District Courts have similarly held the Secretary's regulation to be contrary to express Congressional intent and, therefore, invalid. *Alders* v. *Kennecott Copper Corp.*, No. 76-292-M (D. N. M. 1976); *Brennan* v. *Diamond International Corp.*, 5 OSHC 1049 (BNA S. D. Ohio 1976); *Brennan* v. *Empire-Detroit Steel Division, Detroit Steel Corp.*, No. C-1-74-

345 (S. D. Ohio 1976), *rev'd sub nom., Marshall* v. *Whirlpool Corporation and Empire-Detroit Steel Division, Detroit Steel Corp.*, 593 F. 2d 715 (6th Cir. 1979); *Usery* v. *Whirlpool Corporation*, 416 F. Supp. 30 (N. D. Ohio 1976); *rev'd sub nom., Marshall* v. *Whirlpool Corporation and Empire-Detroit Steel Division. Detroit Steel Corp.*, 593 F. 2d 715 (6th Cir. 1979); *cert. granted*, 48 U. S. L. W. 3188 (1979).

B. Rules of Statutory Construction Militate Against Implication of the Right Which the Secretary Seeks to Create.

The well-established principle of statutory construction "expressio unius est exclusio alterius" holds that "a 'legislative affirmative description' [of certain powers] implies denial of the non-described powers," *Continental Casualty Co.* v. *United States*, 314 U. S. 527, 533 (1942), *citing with approval Durousseau* v. *United States*, 6 Cranch (U. S.) 307, 314 (1810); that "when a statute limits a thing to be done in a particular mode, it includes the negative of any other mode," *Botany Worsted Mills* v. *United States*, 278 U. S. 282, 289 (1929); and that "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies," *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U. S. 453, 458 (1974).

Applying this rule of statutory construction to the scheme of rights and procedures contained in the Act, it can be seen that the Act specifically describes the rights and powers of the employee, the Secretary, and the federal court in situations allegedly involving danger in the workplace. The employee is empowered to request an inspection, the Secretary is to decide whether the situation should be brought to the attention of the federal district court, and the court is to shut down operations if necessary. The Act limits the shutting down of operations in imminent danger situations to be done only in this particular way. The Act does not create a protected employee right to shut

down operations on his own, and expressly provides that his particular right is to set in motion the imminent danger proceduce which, if necessary, will result in a court-ordered shutdown of business operations.

The absence of a protected right to walk off the job is balanced in the Act by the presence of the provisions which directly involve the employee in almost every aspect of the Act's administration and explicitly protect him for exercising his right to be involved, especially the provision which makes the employee the one who sets in motion the Act's imminent danger procedure. In this regard it is further submitted that the right which the Secretary asks this Court to find implicit in the Act—that an employee has the right to shut down the employer's operations on his own and that the employer is required to continue paying him—would completely disrupt the careful scheme of the Act's request for inspection and imminent danger provisions. The end result of the argument advanced by the Secretary would be that employees, as well as federal judges, would have the power to shut down operations. Such a result cannot be found by implication within the four corners of the Act without total disruption of its carefully constructed scheme and, as noted above, serious disruption of the NLRA.

While it is true that an administrative regulation ordinarily is entitled to judicial deference and carries great weight, *e.g., Udall* v. *Tallman*, 380 U. S. 1 (1965), it is equally true that if a regulation is clearly inconsistent with the statute, the regulation is entitled to no deference, carries no weight, and must be found invalid. As this Court observed in *Manhattan General Equip. Co.* v. *Commissioner*, 297 U. S. 129, 134 (1936):

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is . . . [only] the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. . . ."

See, also United States v. *Larionoff*, 431 U. S. 864, 873 (1977); *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 213-214 (1976); *Dixon* v. *United States*, 381 U. S. 68, 74 (1965).

Creation of a protected right to withdraw from work unquestionably would be an awesome legislative decision. Since Congress squarely considered and expressly rejected inclusion of such a right under the protections of the Act, but instead enumerated diverse other, less awesome rights, it is inconceivable that the Secretary's and the Court of Appeals' position accords with Congressional intent.

III.

THE LOWER COURT'S FAILURE CORRECTLY TO TAKE ACCOUNT OF THE FACTS DEMONSTRATES ITS OWN RESERVATION ABOUT THE LEGALITY OF THE DISPUTED REGULATION.

The Court of Appeals, with obvious concern about the legislative history, attempted to rationalize its decision and justify the regulation by finding the regulation to be merely a facilitation of the admittedly protected employee right to invoke special inspection procedures afforded under Section 8(f) of the Act. Thus, in its interpretation of the regulation's application, the Court held:

> "[T]here must be insufficient time to go through normal enforcement channels; . . . ." (C. A. at A35)

and

> "At the trial he [the Secretary on behalf of a complainant] must prove before a federal judge . . . 4) that the urgency of the situation provided 'insufficient time . . . to eliminate the danger by resort to regular statutory enforcement channels.'" (C. A. at A36.)

However, the Court made those observations in the context of a factual setting wherein:

> 1. Prior to July 10, 1974, no employee ever had refused to clear guard screen or to work on the screen for any other purpose (Tr. 28, 58-9, 78-80). The Complainants themselves had performed those tasks on a nightly basis for from eight months to several years (Tr. 8, 28, 42-3, 54-5; Jt. Ex. 1, pp. 227, 239).
>
> 2. Two other employees willingly accepted the work assignment which the complainants refused (Tr. 80).
>
> 3. Since July 10, 1974, no employee (including the Complainants) has refused a work assignment involving guard screen work (Tr. 56, 85).
>
> 4. Guard screen work by Maintenance Department employees extends to 30 man-hours per week and always has been at that level (Jt. Ex. 1, p. 458).

The facts clearly indicate that the condition in question was one that had existed for many years. It was not new or extraordinary. The Act had been in effect for several years prior to the work refusal; at any point during that period, the Complainants or their fellow guard screen employees could have resorted to the normal enforcement channels. None did.[21]

The Court does not reconcile its decision with those facts, even though its own analysis of the regulation would mandate dismissal of the case for want of urgency and/or inadequacy of the normal enforcement channels.

While the Court does cite the June 28 fatality as basis for the Complainants' purported apprehension (C. A. at A6)—possibly as indirect justification for setting up an urgent or no-recourse situation on July 10—it completely ignores other crucial, undisputed facts:

> 1. Following the accident which led to the fatality, and prior to July 10, 1974, Whirlpool made repairs and inspected the screen (Tr. 13).

21. Several months prior to July 10, 1974, OSHA inspectors had conducted a comprehensive inspection of the plant, in company with a maintenance employee who frequently works on the screen. No citation was issued relative to the guard screen as a result of that inspection (Jt. Ex. 1, pp. 354-6, 361-2).

2. Although interim procedures were implemented, temporarily mandating that no employee was to walk on the screen, the Complainants knew on or before July 7—at least three days prior to the disputed work refusal—that their work sooner or later would require that they walk on the screen system.[22]

3. In light of that awareness, the Complainants requested to meet with supervision and did meet with supervision on July 7; they then asked supervision to assign other employees to work on the screen (Jt. Ex. 1, pp. 466-68). Supervision, in turn, declined their request but directed that a further inspection be made of the screen they would have to clean (Tr. 15-16, 33, 60).

Thus, the record shows that the Complainants had at least three days' prior notice of the assignment which they ultimately refused, even apart from the fact that they had performed similar work for years.

The Court of Appeals did not even mention that fact or explain why three days' time was insufficient to invoke the special inspection provisions afforded under the Act.

Nor does the Court reconcile its decision with the fact that the Complainants *did* contact the senior OSHA official in the area about the matter more than one full day prior to receiving the assignment which was refused (Tr. 17-18, 38). Significantly, moreover, by the time that contact was made, OSHA *already* had made an inspection of the screen system, on July 1 and 5 (Jt. Ex. 1, pp. 19-29). This was not, therefore, a case where the urgency of the situation precluded resort to normal administrative remedies. There was ample time and, indeed, the remedies already had been initiated.

22. See testimony of Deemer at Tr. 4, whereat the Complainant testified on direct examination that he knew the interim procedure was inadequate to do the job (". . . that was my opinion. There was just too much stuff that had to be done and it couldn't be done that way") and at Tr. 22 (. . . "I knew we were going to have to walk it sooner or later").

The Court, therefore, created an urgent, no-recourse situation where none existed in fact.[23] It chose to rewrite and/or ignore facts bearing directly on the questions of immediacy and urgency in order to create an impression that the Complainants merely refused the job in order to gain time to invoke regular enforcement procedures. That it did so casts serious doubt upon the strength of the Court's confidence in the soundness of its analysis. In light of the facts which actually appear on the record, the Court properly should have dismissed the complaint for want of a showing that an urgent, no-recourse situation was presented (assuming, *arguendo,* the regulation be found valid despite the legislative history).[24]

23. The Court at footnote 6 of its opinion (C. A. at A6) refers to the fact that a drawn-out citation proceeding followed the accident. The Court apparently is suggesting that the enforcement procedures are too slow to provide effective recourse. That reference is not material, however, because it fails to explain why, if the danger was so immediate, OSHA at no time before or after the work refusal even sought judicial intervention pursuant to Section 13 of the Act.

24. Had the Court fairly acknowledged the facts but nevertheless sustained the Complainants, it clearly would have been invading both the legislative prerogatives of Congress and the regulatory powers of the Secretary as well. Clearly, there is nothing in the regulation itself which even remotely would suggest that a work refusal is protected if undertaken with sufficient time to invoke the statutory procedures, or, certainly where those procedures already have been invoked. Indeed, the regulation *affirmatively* recites:

> "(b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards."

The Court's opinion not only is bottomed on patent misreadings of the facts regarding prior opportunities to utilize the regular enforcement procedures of the Act, it literally is replete with misstatements of fact touching other elements of the regulation as well.

Thus, key elements required to exist as a condition of the protection purportedly extended by the regulation are the certainty and immediacy of danger, and an employer's refusal to take corrective measures to attenuate the danger. The regulation on its face clearly holds that potential or possible hazards are not covered; it holds as well that where there is a dispute as to the existence of a hazard:

> "[A]n employer would not ordinarily[25] be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards."

Indeed, the Court admits that the regulation is directed at conditions which present so clear and obvious danger than an employee is—as the Court emotionally puts it—literally faced with an immediate "life or death" choice (C. A. at A5), and that the employer must be shown indifferent thereto.

In order to mold this case into such a posture, the Court stated:

> "The questionable safety of the 16-gauge screens is demonstrated by several incidents where workers fell partly through them and at least one incident where a worker fell to the plant floor below but survived. A number of maintenance employees reacted to these 'near misses' by frequently bringing the unsafe screen conditions to the attention of their foremen. Their complaints were to no avail, and on June 28, 1974, a maintenance employee fell to

25. The qualification "ordinarily" is not defined. An employer is denied due process when cited for violation of a standard not clearly delineated; to the extent the Secretary attempts to justify the regulation's application in this case by reference to the qualification, the regulation should be held unconstitutionally vague.

> his death through the guard screen in a section where stronger wire mesh had not yet been installed. Although Whirlpool did respond to the fatality by issuing a general order directing maintenance employees to clean guard screens without walking on them and to effectuate some repairs where the screens were weak, two employees who regularly worked on the screens pointed out that many hazardous areas remained. . . . [t]he company did not respond to their fears regarding these areas . . . " [Footnote omitted.] (C. A. at A6.)

Possibly, the Court was so concerned with upholding the regulation that it failed correctly to note the facts which are:

1. Only the two Complainants have ever refused to perform assigned duties on the screen.

2. The two Complainants refused to perform such duties on July 10, 1974 but not before and not since.

3. Their job on July 10 was performed by two other employees who did not protest.

4. There is no evidence that any employee other than the Complainants "complained" about the screen "to no avail." Certainly, there isn't even a bare shred of evidence connecting—as the Court purports to do—any prior complaint about the screen with the fatal accident! Knowledgeable witnesses who testified about the accident admitted that the accident was entirely unforeseeable (Jt. Ex. 1, pp. 212-13, 282). The OSHA inspector stated to Whirlpool management:

> "It was a tragic accident. I believe it resulted from a mechanical failure and I can't see what you could have done to prevent it." (Jt. Ex. 1, pp. 461-62, 535).

And the Review Commission ultimately concluded that there was no basis in the record to find that Whirlpool violated the Act in connection with the accident:

"Although this accident gave rise to the inspection, its occurrence is not reflected in the citation. As noted, the accident occurred as a result of the failure of two bolts. The citation, on the other hand, as indicated by the evidence and arguments of the Secretary, was concerned with the nature of the screen mesh. For example, the compliance officer testified that if all the screens had been comprised of the new heavy gauge mesh, no citation would have been issued. Therefore, whether this accident was the result of a recognized hazard is not before us, and respondent's argument that the accident was the result of an unforeseeable and unpreventable equipment failure is inapposite." *Secretary of Labor* v. *Whirlpool Corporation,* 5 OSHC 1173, 1174 at fn. 1 (BNA (1977).)

The record does show, on the other hand, that:

5. Skilled maintenance employees regularly inspected the screen for defects, defects were corrected as found, and Whirlpool systematically was replacing the screen (Jt. Ex 1, pp. 208-210, 223, 268-70, 459, 513).

6. All of the incidents referred to by the Court had occurred at times remote from the work refusal and on screen which had long since been replaced (Jt. Ex. 1, pp. 161-65, 175, 182, 231, 236-38).

7. Stress tests made by engineers showed that the lightest weight screen construction extant at the time of the events of this case withstood, without signs of failure, 600 pound weights applied to a foot-like area and 300 pounds applied to a single point (Jt. Ex. 1, pp. 514-19 and associated Exhibit R-11).

8. The Administrative Law Judge found that Whirlpool's guard screen was not per se in any way a hazard or known to be such in industry.[26]

26. Commenting on the Secretary's evidence given at the citation hearing, the Judge found:

"The compliance officer, admittedly not qualified as an expert, saw guard screens for the first time at respondent's plant on

(Footnote continued on next page.)

9. Whirlpool did not receive any criticism regarding its guard screen in February, 1974, when another OSHA inspection was conducted within its plant. The inspector was in close proximity to the screen at numerous times during his inspection and was directed in the inspection by a nonmanagement employee who frequently worked on the screen (Jt. Ex. 1, pp. 268-72, 354-59, 384-85, 394-401 and associated Exhibits introduced at the citation hearing as Resp. Exs. 2, 3A-B, 4A-F, 5A-F, 11).

In addition, and *after* the fatal accident but prior to the work refusal:

10. The Complainants and their supervisor toured the guard screen area to look for possible defects. Corrective action was initiated where defects were noted (Tr. 33, 54-5).

11. The supervisor physically tested the screen (by walking on it) before making the disputed work assignment (Tr. 30-1, 40, 48-9, 76-8).

12. The Complainants did not—as the Court states—cite the interim procedure in justification of their refusal.[27]

(Footnote continued from preceding page.)

July 1, 1974, and made no tensile tests of the types of screen involved at any time. He felt that the newer type screen which was in the process of installation by the respondent would comply with the Act but was not sure of the proper method of abatement and intended to leave the choice of a method of abating the hazard to Whirlpool.

"The expert called by the complainant, who had no experience with suspended screen guard systems, while he felt that the screens were not adequate to sustain the weight of a walking man, he made no stress tests of the screen and did not suggest a method of abating the hazard." *Secretary of Labor* v. *Whirlpool Corporation,* 1977-78 OSHD ¶ 22,073 (CCH, 1977).

27. Testimony of the Complainants will be searched in vain for any such statement. The Court's statement is inconsistent with the following direct testimony of Complainant Deemer:

Q. "Did you ask Mr. Price why you couldn't clean it from the Verta-Lift as you had been doing?

A. "Not really, because I knew we were going to have to walk on it sooner or later." (Tr. 22)

> They refused without any explanation other than the general safety of the screen.

There is no dispute about any of the foregoing facts. There should be no dispute that the foregoing facts take this case far outside the ambit of the regulation. The facts show that the Complainants but no one else believed that their assignment on July 10, 1974 presented a clear and immediate danger, that Whirlpool had taken considerable care to identify and correct hazardous conditions both before and after the fatal accident,[28] and that there was at best a difference of opinion on July 10, 1974 over the general safety of the screen system rather than some clearly dangerous condition which presented a "life or death" choice.

Regardless whether this Court determines that the regulation properly or improperly extends the protections of the Act to certain work refusals, it should be clear that *this* work refusal was not protected. Moreover, that the Court of Appeals felt compelled to exaggerate and misstate the facts in order to create a setting in which to sustain the regulation, should demonstrate again the need for judicial deference to Congress' policy-making prerogatives regarding the need for work refusal protection.

Presented here was a dispute between two employees and their immediate supervisors regarding the question whether a normal work assignment was potentially a hazard. The matter had been discussed well before the work refusal occurred. Supervision had acted previously to correct what hazards may have existed and had physically tested the condition. OSHA

28. Although OSHA did issue to Whirlpool a citation, which the Review Commission recently affirmed, OSHA gave Whirlpool maximum credit for good faith relative to the guard screen (Jt. Ex. 1, pp. 62-63). The Commission affirmed that position, noting:

> "Whirlpool's good faith towards compliance with safety requirements is evidenced by its program to improve the safety of the guard screen system. . . ." *Secretary of Labor* v. *Whirlpool Corporation,* 7 OSHC 1356 at 1361 (BNA, 1979).

had been contacted and had investigated but declined to take action to have the condition shut down. The conditions were not viewed as abnormally dangerous by other employees or, indeed, by the Complainants in the course of numerous hours of work thereon prior to July 10, 1974, or after that date.

This is precisely the kind of situation Congress elected not to regulate under OSHA; the Secretary's regulation so holds; and the complaint, accordingly, should be dismissed.

CONCLUSION.

For the foregoing reasons, Whirlpool respectfully requests this Court to enter an Order reversing the decision of the Court of Appeals and affirming the decision of the District Court with respect to the issue as to the validity of the Secretary's regulation. Whirlpool further requests this Court to enter an Order reversing the decisions of the Court of Appeals and District Court with respect to the issue as to whether Whirlpool unlawfully disciplined the Complainants for refusing to perform their work assignments on July 10, 1974.

Respectfully submitted,

ROBERT E. MANN,
RONALD J. HEIN, JR.,
MARK A. LIES, II,
Attorneys for Petitioner, Whirlpool Corporation.

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON,
55 East Monroe Street, Suite 4200,
Chicago, Illinois 60603,
(312) 346-8000,
Of Counsel.